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Division II
State of Washington
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No. 50642-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DAVID LEE PARKER,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-03703-1
The Honorable Timothy Ashcraft, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. David Parker's guilty plea was involuntary because he was misinformed about the sentencing consequences of his plea.

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Where due process requires that a person pleading guilty to a crime be correctly informed about the sentencing consequences of the plea, is David Parker's guilty plea involuntary because at the time of the plea he was misinformed about the length of the bargained for drug offender sentence? (Assignment of Error 1)
2. Does David Parker's appeal present an issue that is a manifest error effecting a constitutional right? (Assignment of Error 1)

III. STATEMENT OF THE CASE

The State charged David Parker by Information with unlawful possession of a firearm (RCW 9A.41.040), possession of a stolen firearm (RCW 9A.56.140, .310), attempting to elude a pursuing police vehicle (RCW 46.61.024), and bail jumping (RCW 9A.76.170). (CP7-9) Parker and the State negotiated a plea bargain. (RP 60) Parker agreed to plead guilty to an amended information charging unlawful possession of a firearm, unlawful

possession of a stolen vehicle, and attempting to elude, and the State agreed to recommend that Parker be sentenced under the special drug offender sentence alternative statute (DOSA). (RP 60; CP 11-12, 13, 14-23)

Parker's written plea statement form indicates that the prosecuting attorney will recommend concurrent DOSA sentences for each count. (CP 17) The form lists Parker's standard range for the most serious offense, unlawful possession of a firearm, as 77 to 102 months. (CP 15) The form also states that the mid-range for unlawful possession of a firearm is 94.5 months, and that Parker would therefore be incarcerated for 47.25 months and on community custody for 47.25 months. (CP 17)

Parker acknowledged that he committed the stolen vehicle and elude offenses, but did not acknowledge committing the firearm possession offense. (CP 22) Instead, Parker states: "I am not guilty of this offense. However ... I believe there is a substantial likelihood that I would be convicted if I had a trial. Therefore, I am pleading guilty to take advantage of the State's offer." (CP 22)

At the plea hearing, Parker acknowledged that he and his attorney had discussed the sentencing recommendation agreed to by the prosecutor. (RP 65-66) Parker told the court that he

understood that he would serve 47.25 months in prison and 47.25 months on community custody if the court followed the agreed-upon sentence recommendation. (RP 65-66) The trial court found that Parker's plea was made freely, voluntarily and intelligently and accepted the plea. (RP 71-72)

Before the sentencing hearing, Parker filed a motion to withdraw his plea. Parker claimed he felt pressured by his attorney to plead guilty, and that there was paperwork in a storage unit that could exonerate him on the possession of a stolen vehicle charge. (CP 24-16; RP 92-93) The trial court denied the motion. (RP 94-95, 100-10, 107; CP 208-15)

The trial court adopted the joint sentence recommendation. (RP 111) The court imposed concurrent DOSA sentences, directing that Parker serve a total of 47.25 months of incarceration and 47.25 months on community custody. (CP 194-95) Parker timely filed a Notice of Appeal. (CP 202)

The State subsequently discovered that the midpoint of the standard range for unlawful possession of a firearm had been miscalculated. (CP 219, 220) The midpoint is actually 89.5 months. (CP 219) The trial court entered an order correcting the Judgment and Sentence, so that Parker will now serve a total of

44.75 months of incarceration and 44.75 months on community custody. (CP 220-23)

IV. ARGUMENT & AUTHORITIES

Parker entered into the plea agreement with the State on the understanding that the prosecutor would recommend a sentence under the special drug offender sentencing alternative (DOSA), RCW 9.94A.662. (CP 17; RP 65-66) The DOSA statute provides, in relevant part:

A sentence for a prison-based special drug offender sentencing alternative shall include:

(a) A period of total confinement in a state facility for one-half the midpoint of the standard sentence range[;]

(b) One-half the midpoint of the standard sentence range as a term of community custody [.]

RCWA 9.94A.662(1)

The parties believed at the time of the plea that the midpoint of Parker's standard range was 94.5 months and that he would therefore serve 47.25 months in prison and the same length of time on community custody. (CP 17; RP 65-66) But Parker's standard range for unlawful possession of a firearm is 77-102 months, so the midpoint is actually 89.5 months. (CP 15) Thus, Parker was misinformed about the length of his agreed-to sentence by the prosecutor, his attorney and the court. (CP 17, 65-66) Parker

pleaded guilty without understanding the true sentencing consequences of his plea.

A plea is valid under state and federal constitutional due process standards only if it is knowing, voluntary and intelligent. Wash. Const. Article I, § 3; *Wood v. Morris*, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976); U.S. Const. Amd. XIV; *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed 2d 108 (1976). A plea is involuntary when a defendant did not understand or was misinformed about the direct consequences of pleading guilty. *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). Absent correct information regarding consequences, the defendant is incapable of entering a knowing, intelligent, and voluntary plea. *State v. Ross*, 129 Wn.2d 279, 288, 916 P.2d 405 (1996).

“A defendant must understand the sentencing consequences for a guilty plea to be valid.” *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988); *see also State v. Skiggn*, 58 Wn. App. 831, 795 P.2d 169 (1990); *Barton*, 93 Wn.2d at 305. “A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.” *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). Accordingly, a guilty plea is involuntary if it is undertaken based on a mutual mistake regarding the length of

the standard range sentence. See *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

When a defendant is misinformed about a direct sentencing consequence of a guilty plea, he need not demonstrate that the misinformation materially affected his decision to plead guilty. *State v. Mendoza*, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). That is because a guilty plea based on misinformation about a direct consequence of the plea is involuntary “regardless of whether the actual sentencing range is lower or higher than anticipated.” *Mendoza*, 157 Wn.2d at 591.

The parties in this case entered into the plea agreement believing incorrectly that Parker’s DOSA sentence would total 94.5 months, split evenly between incarceration and community custody. This is what Parker was told, and this is what he understood to be the sentencing consequence he faced when he pleaded guilty. (CP 17; RP 65-66) But the parties miscalculated, and Parker’s correct DOSA sentence should have totaled 89.5 months. (CP 219, 220) Parker was clearly misinformed as to a direct consequence of his plea, rendering his plea invalid. *State v. Barber*, 170 Wn.2d 854, 858, 248 P.3d 494 (2011) (citing *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003)).

The fact that Parker entered an *Alford* plea for this offense makes the misunderstanding all the more problematic. *Alford* pleas do not involve an admission of guilt but instead are entered by a defendant maintaining his innocence but deciding to plead guilty to take advantage of the State's offer. See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). In such situations, the defendant makes "calculations about the costs and benefits of standing trial" or accepting a plea, despite maintaining his innocence. *State v. Stowe*, 71 Wn. App. 182, 188, 858 P.2d 267 (1993). Because of their equivocal nature, an *Alford* plea is valid only if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Stowe*, 71 Wn. App. at 187; see also *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1970). But here, Parker was unable to make an intelligent choice, or accurately weigh his available options, because he was misinformed about the consequences of one of the options.

Parker did not ask to withdraw his guilty plea on this ground below. However, this court may consider an argument raised for the first time on appeal where the appellant raises a "manifest error

affecting a constitutional right.” RAP 2.5(a)(3). “[G]iven the fundamental constitutional rights of an accused which are implicated when a defendant pleads guilty, a claim that a guilty plea pursuant to a plea agreement was involuntary due to a misunderstanding about the standard range sentence is the kind of constitutional error that RAP 2.5(a)(3) encompasses.” *Walsh*, 143 Wn.2d at 8. Parker’s claim is of constitutional magnitude. And an involuntary plea creates a manifest injustice. *Isadore*, 151 Wn.2d at 298. Accordingly, Parker may raise this claim for the first time on appeal.

Because Parker was misinformed about the direct sentencing consequences of his plea, his plea was involuntary and invalid. Where a plea agreement is based on misinformation, as in this case, the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. *Walsh*, 143 Wn.2d at 8-9; *Mendoza*, 157 Wn.2d at 591.

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V. CONCLUSION

Parker was misinformed about the sentencing consequences of his plea, and his plea was therefore involuntary and invalid. Accordingly, Parker's case should be remanded to the Superior Court to allow him to withdraw his plea.

DATED: November 29, 2017



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CERTIFICATE OF MAILING

I certify that on 11/29/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: David L. Parker, DOC# 877993, Monroe Correctional Complex, P.O. Box 777, Monroe, WA 98272-0777.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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